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No. 189.

Office Supreme Court U.S.
FILED
APR 18 1902
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Filed Apr. 18, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

LEE LUNG, APPELLANT,
v.
I. L. PATTERSON, COLLECTOR OF CUSTOMS for the port of Portland, Oreg. } No. 189.

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BRIEF FOR THE UNITED STATES.

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The appellant, a Chinese merchant domiciled in this country, prayed for habeas corpus on behalf of his wife and minor daughter, whose admission was denied by the collector. (Rec., pp. 1–7.) The writ was issued (p. 8) and return made (pp. 9–17), which was traversed (p. 17); testimony was taken (pp. 25–40), and after hearing, the petition was dismissed on the ground that the court was without jurisdiction. (Order of the court, p. 19; opinion, pp. 20–22.)

I.

THE EXECUTIVE DECISION IS FINAL.

The appellant's claim is that the collector had no power to examine into the matter *aliunde* the certificates presented by the wife and daughter, which, under

Article III of the treaty of 1894, were claimed to be conclusive as to the right to enter and remain; that on appeal to the Secretary of the Treasury the adverse decision was made either by the chief of the division of special agents or by an Assistant Secretary, which is not a valid decision.

It is clear from the collector's answer that the certificates were not ignored, but were held to be insufficient, among other reasons because they were not signed by the proper officer of the Government of Hongkong. Section 6 of the act of 1884, in its last paragraph, reserves to the United States the right to controvert a certificate and disprove the facts therein stated. Upon appeal, the Secretary of the Treasury, by Assistant Secretary Spaulding, sustained the rejection of the certificates and the denial of entry, especially in the case of the wife under the testimony elicited, on the ground that she was the second and plural wife, and that the laws of the United States do not recognize plural marriages as valid. In the case of the daughter, a minor child of the appellant by his first wife, the Secretary found that the evidence presented is conflicting and inconclusive. The appeals in both cases were overruled, and the decision denying admission sustained. The petitioner having averred that the original hearing before the collector was held before the petitioner had secured counsel—was perfunctory and was not a thorough examination of the case, testimony was subsequently taken before the court under objection by the United States, both parties being duly represented by counsel (p. 25 *et seq.*).

There can be no doubt that the decision of Assistant Secretary Spaulding herein (p. 16) is the decision of the Secretary of the Treasury. It is useless to contend that the initials "W. S. C." on this letter make it a "pretended decision" only of the chief of the special agents, or that the decision of the Assistant Secretary was not in legal effect and for all purposes the decision of the Secretary. In the case of *Parish* v. *United States* (100 U. S., 500), Mr. Justice Miller delivering the opinion of the court, it was stated that:

> It has been found in regard to many of these bureaus, and even to the heads of departments, that it is impossible for a single individual to perform in person all the duties imposed on him by his office. Hence statutes have been made creating the office of assistant secretaries for all the heads of departments. It would be a very singular doctrine, and subversive of the purpose for which these latter offices are created, if their acts are to be held of no force until ratified by the principal secretary or head of department. It was to relieve the overburdened principals of some part of these duties that the office of assistant was created.

In *United States* v. *Adams* (24 Fed. Rep., 348) the court said: "An act done by the assistant, and within the authority and power of the Department, must, until the contrary appears, be presumed to have been done under the direction of the Secretary of the Treasury."

In the case of the *John Shillito Co.* v. *McClung* (51 Fed. Rep., 568) where the decision of the Secretary

of the Treasury, on appeal from a decision of the collector, was adverse to the importer, it was contended that such decision, being made, not by the Secretary of the Treasury, but by the Assistant Secretary of the Treasury, acting in his official capacity as such Assistant Secretary only, "was on that account unauthorized and void and of no effect." The court said:

> It having been found impossible for the heads of Departments to perform in person all the duties imposed on them by law, the office of Assistant Secretary was created for all the Departments. In the Treasury Department two of such assistant secretaries are required to be appointed. * * * It admits of no question that * * * the Secretary of the Treasury could have assigned to the Assistant Secretary or Secretaries of the Treasury Department the duty of deciding appeals from assessments made by collectors of customs duties; nor can it be doubted that in the absence or sickness of the head of that Department, such Assistant Secreretaries could have lawfully performed his duties in respect to such matters which have to be determined, settled, and adjusted in that Department. The reply does not negative the fact that the Assistant Secretary was not assigned by the Secretary of the Treasury to the performance of the duty of deciding the appeal, nor that there was no absence or sickness of the head of the Department which devolved the duty upon the Assistant Secretary. Under such circumstances, is the want of authority to be assumed, or will the law raise a presumption to the con-

> trary in support of the official act? We are clearly of the opinion that the latter is the rule to be applied. [Citing *United States* v. *Peralta*, 19 How., 347; *Parish* v. *United States*, 100 U. S., 500; *Chadwick* v. *United States*, 3 Fed. Rep., 756.]

Under sections 161, 233, 234, and 245, Revised Statutes, authorizing the heads of departments in general, and the Secretary of the Treasury in particular, to prescribe the distribution and performance of departmental duties through various officers, including assistant secretaries, it must be assumed that the action of Assistant Secretary Spaulding here was taken by direction and in behalf of the Secretary. Opposing counsel do not, however, urge this point in the present argument.

The necessity of strict compliance with the statutory requirements as to certificates, including signature or visé by authorized officials, is shown by the following rulings of the Attorney-General and the Secretary of the Treasury:

In 21 Op., 6, the Attorney-General held that the requirements of section 6, of the act of 1884, "should be strictly complied with by applicants for admission." In 22 Op., 130, Mr. Griggs, referring to that opinion, said:

> It has been held by your Department [the Treasury Department] that the omission of any of the statutory requirements from a certificate is a fatal defect, and that the provisions of the

> treaty of 1894 * * * do not waive any of the requirements of section 6 of the act of 1884 as to certificates of merchants and others of the exempt classes (*United States* v. *Yong Yew*, 83 Fed. Rep., 832).

And in 21 Op., 347, the Attorney-General held that in the case of a Chinese subject, a resident of Hongkong, seeking admission to the United States, the requirements of Article III of the treaty of 1894 would not be satisfied by a certificate from the Chinese Government, but that the applicant must produce a certificate from the government of Hongkong, signed by the registrar-general.

"The uniform rule of the Treasury Department and the opinions of this Department show the view that the act should be strictly complied with by applicants for admission." (22 Op., 608.) See also 21 Op., 68; id., 424; 22 Op., 72; T. D. 17140, 18954, 20079, 21252.

As is shown by the certificates in this case (pp. 13, 16), they bear on their face a reference to the necessity of exactitude and strict compliance in all details, and to the fact that in any case they show only a *prima facie* right to enter the United States.

The language of section 6 of the act of 1884 clearly shows that these views are founded upon express requirements of the law, and as the certificate is not conclusive, the collector, as one of the "United States authorities" referred to, may, and indeed should, take testimony to controvert or disprove the certificate whenever he is not satisfied that it should be accepted as conclusive evidence of the right to enter. There

is no just reason for claiming that the collector's examination was merely perfunctory and his decision only a "pretended decision"—that is to say, not a decision deliberately, carefully, and judicially made in view of all the facts.

This case shows another endeavor to escape from the act of August 18, 1894, making such an executive decision final unless reversed on appeal to the Secretary of the Treasury. It is another attempt to avoid the executive jurisdiction on the ground that "the alien is entitled of right by some law or treaty to enter this country, but is nevertheless excluded by such officers;" that is, the immigration officers. The court, in the *Lem Moon Sing case* (158 U. S., 538), has made it very clear that the courts will not take jurisdiction of such a case, and that the executive jurisdiction is final, even if the alien may be so entitled of right. For in the case cited the court declined to express any opinion upon the question whether the applicant there was entitled of right under some law or treaty to reenter the United States. Lem Moon Sing, being a returning merchant, made such a claim, perhaps with great force. We do not think there is a similar meritorious ground here, for in the first place Article III of the treaty of 1894 gave no new right to Chinese of the permitted classes, and made no material change in the certificate requirements of the act of 1884; and however strong the appeal which the child's case presented (determined adversely, however, by the Secretary's final decision under his exclusive authority), the case of the wife presents no such appeal.

Other authorities are given by the court below to support the contention that the action of the collector is final and not reviewable by the courts, including the case of *Nishimura Ekiu* (142 U. S., 651), which held that the similar statute there involved "does not require inspectors to take any testimony at all, and allows them to decide on their own inspection and examination the question of the right of any alien immigrant to land."

As to the appellant's brief, the argument practically is that the collector is bound by the certificates presented, and that by "rejecting" them he exceeds his jurisdiction. It merely begs one of the preliminary questions, and a subsidiary one, to suggest that the collector rejected "a certificate that is in all respects such a certificate as the law prescribes." The law provides that the certificate shall be *prima facie* evidence, that it shall be the sole evidence permissible on the part of the person producing it; but that it may be controverted and the facts therein stated disproved by the United States authorities.

Of course the collector considered the certificates and passed upon their validity, and, holding them irregular, insufficient, and inconclusive, passed on to the independent further inquiry which the law not only permits but directs when there is any doubt, and reached the decision which the law makes final when sustained by the Secretary of the Treasury. No number of italicized statements or refined distinctions in argument on the terms of the law can obscure the perfectly plain meaning of section 6 of the act of 1884,

nor weaken the unimpeachable action of the collector under that act and the finality of his decision under the act of August 18, 1894. The collector not only decided that the certificates were not such certificates as the treaty and the law require, but he decided that the applicants were not entitled to admission. In either aspect his decision is not in excess of his jurisdiction, and it is conclusive.

It is a necessary presumption that the action of the collector was in accordance with law, agreeably to the general presumption as to all official acts. Such presumption is particularly binding under the language of the Chinese-exclusion statutes and the act of 1894, and includes all the official acts performed and steps taken. No claim to the contrary may be validly supported by reference to the brevity of the statement indicating the decision. It is by no means confined to the phrase suggested by counsel as the cause of refusal, namely, "irregularity of consular certificates;" for the record shows (pp. 12–14, 16) a hearing in each case before the collector, witnesses on behalf of the applicant being produced, and besides the irregularity of the papers, the ground that there was no evidence of marriage in the wife's case was stated, and after due consideration it was ordered that the applicants be refused a landing because the evidence was insufficient and unsatisfactory to prove the right to land. There is no ambiguity about the collector's finding, which was a proper and orderly "decision;" he is not required to point out the irregularity, nor competent when he finds irregularity to

speculate abstractly on the question whether it does or does not affect the validity of the certificates. He did not "leave the question wholly in the dark," but decided the case, and decided that the certificates were invalid—that is, under all the circumstances shown, insufficient to establish the right and permit a landing. The certificates had the full benefit of their *prima facie* status under the law, but were controverted and overthrown after hearing on the whole case.

The argument that Article III of the treaty of 1894, by its permissive language, relaxes the severity of the certificate requirements of the previous laws, and that in general that treaty has abrogated nearly all the Chinese-exclusion laws, has been elaborately presented to the court in recent cases. The Government here contents itself with a reference to its opposing argument therein, of which an outline is:

1. That the treaties and the statutes are parts of a consistent and interdependent scheme, modifying each other consecutively in certain details, but not abrogating any essential feature of the exclusion plan.

2. That the diplomatic history and the terms of the treaty of 1894 show no intention to repeal existing laws, but the contrary.

3. That (especially in view of the foregoing) the doctrine of implied repeals, never favored, can not be extended to cover such a repeal of the statutes by this later treaty.

4. That the manifest purpose and the consistent construction of the supposed "permissive" language of

Article III of the treaty declares that section 6 of the act of 1884 is only thus far affected, viz, that now a Chinese subject of the permitted classes *must* present the required certificate from the Government of residence and not from the Government of China, unless such person comes from China (21 Op. A. G., 347; 22 id., 201; T. D. 20079, 17140).

II.

THE WIFE'S STATUS ON THE MERITS.

The opposing brief takes no notice of this question, but it seems advisable, nevertheless, for the Government to discuss it briefly.

The case of *Mrs. Gue Lim* (176 U. S., 459), is distinguishable from the present in two important particulars. In the first place, that woman was *allowed to land* by the collector as the wife of a Chinese merchant lawfully domiciled in the United States, who accompanied her husband to this country on his return from a temporary absence in China; and subsequently she was arrested and taken before the district court on the charge that she was a laborer without a certificate of registration as such. The essential point presented by the Government in the Supreme Court was that she was not entitled to enter this country without the certificate of the act of 1884, so that, having been admitted by the collector without that certificate, and being charged with the failure to produce it in the interior judicial jurisdiction, the question of the finality of the frontier officer's decision when adverse was not

presented. In the next place, the assumption as to Mrs. Gue Lim was that she was the *valid* wife of a Chinese merchant.

The statement of the case and the opinion do not indeed use that adjective, but that was the basis upon which the entire argument rested. The language of the opinion constantly refers to *the* wife of a Chinese merchant, and to Mrs. Gue Lim as *the* wife of a merchant. So as to the minor children whose claims were passed upon in that case. The argument conceded them to be legitimate children; the statement is that they "were born in China of parents lawfully married." It was not suggested that they might be legitimate by Chinese law, but not by our own. It was no doubt largely, or chiefly, because of doubt in the mind of the Secretary of the Treasury whether under the peculiar Chinese marriage laws or customs and relations the woman here was the valid wife, and because of our own very different and positive laws on this subject, that his ruling was against her.

The testimony in the present case is supposed to show what are the Chinese laws or customs and the Chinese ceremonies respecting marriage (pp. 25–27, 29–30, 37). It is clear that the petitioner recently married this wife in China, and lived there with her; that this wife is 21 years old and the daughter 10; that the daughter's mother is his first wife, and his wife at present, and is living in China; that after this second or plural marriage petitioner and both of his wives lived for a time together in the same house; that the

law and usage in China are that a man, or at least a rich man, can have as many wives as he wants (pp. 29–35, 38, 39). The petitioner lived in China with both wives in his own house, where the other wife and her boys are—apparently full brothers of the girl.

This subject not only includes the customs, usages, and ceremonies, but also the laws of an alien civilization. The legal status of marriage is a matter of high importance in all civilized countries, whether their civilization is oriental or occidental, and in all Western countries the sanctions of the law of marriage are regarded as peculiarly high and solemn. Western systems have carried into this law Western morals. I conceive that the loose and informal testimony in this record does not constitute adequate proof to bring to judicial notice and establish as a fact the Chinese law upon the subject. Foreign laws are to be proved as facts, and to constitute sufficient and satisfactory proof the courts should be assured either by the testimony of qualified experts, or by the production of duly certified copies or volumes of the laws, published by authority, that the provisions of foreign laws invoked are thus and so.

"No court is to be charged with the knowledge of foreign laws; but they are well understood to be facts, which must, like other facts, be proved before they can be received in a court of justice." (*Hanley* v. *Donoghue* 116 U. S., 1, 4, citing *Talbot* v. *Seeman*, 1 Cranch, 1, 38; *Church* v. *Hubbart*, 2 Cr., 187, 236; *Strother* v. *Lucas*, 6 Pet., 763, 768; *Dainese* v. *Hale*, 91

U. S., 13, 20.) See also *The New York*, 175 U. S., 187; *Liverpool Steam Co.* v. *Phœnix Ins. Co.*, 129 U. S., 397, 445.

Where the foreign system does not include a body of statutes and decisions published under due authority and readily accessible, or preserves the rules of law in ancient books and traditional codes, as appears to be the case with part of the jurisprudence on which the modern civil law is founded, and in the Chinese system, then there should be some authentic deliverance of a living doctor or pundit learned in the particular law, whose standing is well known or can be satisfactorily shown to the court. In any case, it would be manifestly wrong to receive as materially affecting the given controversy the statements of unlearned men in a matter requiring expert qualifications. The witnesses here were vitally interested in the controversy, or else were manifestly friendly and partial toward the principals who were so interested.

These contentions are emphasized when it is considered that after a foreign law has been proved as a fact before a court, its construction and effect become a question of law for the court. (Story on Conflict of Laws, section 638; *Trasher* v. *Everhart*, 3 Gill and John., 234, 242; *Mostyn* v *Fabrigas*, Cowp., 174; *Downs* v. *United States*, 113 Fed. Rep., 144.) This weighty and characteristic function of the court should not rest upon doubtful assertions of the law as a fact.

As to the underlying question, I do not think it is necessary to argue at length. In the abstract, the decision as to Mrs. Gue Lim perhaps may be viewed as

implying nothing relative to the tests by which a wife and children are to be viewed as properly holding and claiming those characters. In this case the child, as the child of the first wife, might be viewed under our own laws as legitimate and as not affected by a second marriage (the first wife living), which under those laws would be merely bigamous. But as to the child, all that is necessary to be said is that the Secretary of the Treasury decided her case adversely on testimony which he found to be conflicting and inconclusive, and that decision is final. If the courts were permitted to consider the parental or filial desires and the well-being of the child, it might be loth to find that she would not be better off with her own mother and her brothers in China than she would be here with her father and a plural wife. As to that wife, it may be that her status in China would be valid and well recognized. We are not concerned with the different ethical notions which might make that possible in China, as has been the case immemorially in many Eastern countries. But we are concerned with our own tests of law and morals as essentially intertwined in this subject; and the woman's position here, whether the other wife is in this country or not, is simply that of a pretended wife, living in bigamy, which is forbidden by all our laws and principles. The petitioner here sees no harm in bigamy or polygamy, if a man can afford it; and that may be the well-recognized attitude of Chinese civilization; but all these ideas are under the ban in this country. The objection that

State laws determining what constitutes a valid marriage are diverse is not tenable; for in the first place there is a certain uniformity running through all American laws on the subject, and in the next place no State law permits plural marriages. The test of the validity of marriage to a single wife is not really involved, or may be left to the law of the place where the marriage was solemnized; the argument of the Government is not subject to the dilemma suggested, for it stops short of that question and merely contends that on any test of the validity of the marriage ceremony and relation no man in the United States can legally have two or more wives at one time.

The facts in the case of Mrs. Gue Lim necessarily imply that it would be harsh and unreasonable to construe the certificate requirements of our Chinese exclusion laws so as to exclude the valid wife of a domiciled merchant; that the contrary view is not required by our laws and would lead to highly immoral results. Quite as clearly would the present case lead to immoral results by other ways if the validity of the marriage relationship and the consequent right of a wife to enter are to be tested by Chinese usages and laws and not by our own, if a man having a first wife living here or in China—by our rules his only valid wife—may also bring in as part of his home and domestic establishment a second wife or any number of plural wives. Suppose a Chinaman's first wife were living with him here. On the claims here advanced he would have the right to bring a second or third wife or any num-

ber of wives. If he did so, would he not be subject to prosecution under the various State and Federal laws prohibiting bigamy and polygamy? And if the first wife were not living here, and he sought to bring in a subsequent wife, or only one of several subsequent wives, we might not ignore the *lex loci* (which generally controls personal and domestic relations) so far as to admit the woman and then prosecute for bigamy; but we certainly ought not to ignore our own principles and laws so far as to admit a concubine, wherever the rest of the "wives" may be. It seems to me that such considerations are conclusive of this controversy.

I respectfully submit that the judgment of the district court of the United States ought to be affirmed and the petition for the writ herein stand dismissed.

HENRY M. HOYT,
Assistant Attorney-General.

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